Filed 4/23/19 Mirfakhraie v. City of Irvine CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

RAMIN MIRFAKHRAIE et al.,	
Plaintiffs and Appellants,	G055324
v.	(Super. Ct. No. 30-2014-00707952)
CITY OF IRVINE et al.,	O P I N I O N
Defendants and Respondents.	

Appeal from a judgment of the Superior Court of Orange County, James Di Cesare, Judge. Affirmed.

Lari-Joni & Bassell and Torsten M. Bassell for Plaintiffs and Appellants.

Woodruff, Spradlin & Smart, Daniel K. Spradlin, Jeanne L. Tollison and Roberta A. Kraus for Defendant and Respondent City of Irvine.

Law Offices of Cleidin Z. Atanous and Cleidin Z. Atanous for Defendant and Respondent Jefferson Enriquez.

INTRODUCTION

Appellants Ramin, Shahriar, Mojgan, and Sepideh Mirfakhraie appeal from a judgment after a jury trial. Appellants sued the City of Irvine (the City) and others after their father, Mohsen Mirfakharaie, was killed in a crosswalk. Appellants alleged the roadway was in a dangerous condition and the City had notice of the condition but failed to remedy it.

The jury returned a defense verdict, and appellants assert errors concerning jury instructions, expert testimony, and juror misconduct. These errors, they contend, were prejudicial and mandate a reversal of the judgment.

We affirm the judgment. We perceive no errors in the decisions by the trial court appellants have identified, many of which involve the exercise of the court's discretion. And we conclude appellants have not established prejudice, even if the trial court was mistaken.

FACTS

During the evening of March 8, 2013, a vehicle struck and killed Mohsen Mirfakhraie in a crosswalk on Trabuco Road in Irvine. Jefferson Enriquez was driving the vehicle.[1] Appellants, Mirfakhraie's children, sued the City and Enriquez for wrongful death.

As to the City, appellants alleged Trabuco Road at the scene of the accident was public property in a dangerous condition. Specifically, appellants contended an out-of-order street light rendered the crosswalk too dark for motorists to see their father crossing the street until it was too late to avoid hitting him, and the crosswalk itself was unsafe. The theory was that because the speed limit on Trabuco Road was 50 miles per hour and there was no traffic signal or stop sign at the intersection, the crosswalk created

[1] Enriquez is also a party to this appeal, but none of the issues appellants have raised on appeal involve him.

in pedestrians a false sense of security that they could cross the street safely. Appellants also asserted the City had notice the Trabuco Road intersection was dangerous.

After 21 days of trial, the jury found that Trabuco Road was in a dangerous condition at the time of the accident. But the dangerous condition did not create a reasonably foreseeable risk this kind of accident would occur. Having made this decision, the jury did not reach additional questions regarding notice of a dangerous condition, Enriquez's liability, Mirfakhraie's contributory negligence, or the City's design immunity.

Judgment was entered on February 16, 2017. Appellants' motion for new trial, based partly on juror misconduct, was denied on July 5.

DISCUSSION

Liability of public entities for injury is exclusively statutory. (*C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 868.) Three Government Code statutes[2] are relevant to the issues in this appeal. The first sets out the elements of public entity liability in general. Section 835 provides: "Except as provided by statute, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either: [¶] (a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or [¶] (b) The public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition."

[2] All further statutory references are to the Government Code unless otherwise indicated.

Another statute, section 830, subdivision (a), defines "dangerous condition," as the term in used in section 835. A "dangerous condition" is "a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used."

Finally section 830.5, subdivision (a), a later addition to the statutory scheme, provides, "Except where the doctrine of res ipsa loquitur is applicable, the happening of the accident which results in the injury is not in and of itself evidence that public property was in a dangerous condition."

These statutes provide the framework for analysis of the issues in this case. Appellants assert that errors in jury instructions, erroneous admission of expert testimony, and juror misconduct mandate reversal of the judgment in the City's favor.

I. Jury Instructions

"A party is entitled upon request to correct, nonargumentative instructions on every theory of the case advanced by him which is supported by substantial evidence." (*Soule v. General Motors Corp*. (1994) 8 Cal.4th 548, 572 (*Soule*.) A jury instruction that a court chooses to give must be a correct statement of the law. (*Maureen K. v. Tuschka* (2013) 215 Cal.App.4th 519, 526.) If an instruction is requested and refused, we view the evidence in the light most favorable to the party proposing it to determine whether that party was entitled to the instruction. (See *Ayala v. Arroyo Vista Family Health Center* (2008) 160 Cal.App.4th 1350, 1358.)

As with other matters of appellate review, it is not enough to show that a jury instruction is erroneous; it must also be prejudicial. "A judgment may not be reversed for instructional error in a civil case 'unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.' [Citation.]" (*Soule, supra,* 8 Cal.4th at p. 580.) In other words, the error must have prejudicially affected the verdict. (*Ibid.*) To

ascertain prejudice, we examine "(1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's arguments, and (4) any indications by the jury itself that it was misled." (*Id.* at pp. 580-581.) We review the jury instructions de novo and as a whole, not individual instructions in isolation. (*Cristler v. Express Messenger Systems, Inc*. (2009) 171 Cal.App.4th 72, 82.)

Appellants have objected on appeal to two categories of jury instructions: a limiting instruction on notice letters to the City and the instructions on dangerous condition of public property. They contend the limiting instruction, given during trial as these letters were being admitted into evidence, effectively erased the letters from the jury's consideration and prejudiced their ability to present evidence of notice and foreseeability. As to the "dangerous condition" instructions, they object to three instructions they say incorrectly stated the law, were vague, and were unduly favorable to the City.

A. Limiting Instruction on Notice Letters

Appellants sought to introduce a group of letters to the City from the local homeowners' association and various residents of the Trabuco Road area complaining about the intersection where the Mirfakhraie accident occurred. The subject first came before the trial court through a motion in limine by the City. The City objected to the admission of these letters as evidence that the intersection was dangerous or hazardous as hearsay and lay opinions. Appellants sought to introduce the letters as relevant to the issue of the City's notice of a dangerous condition.

When it ruled on the motion in limine, the trial court held that "the letters redacted would be relevant to notice." Later in the trial, the court explained to counsel, "These letters are full of opinions." Consequently, "You'll have to fashion a special instruction that will deal with these letters that will allow the jury to treat them for their true purpose and limited admissibility. And also direct that they may contain conclusions

and statements which are not to be considered by the jury for any other purpose other than notice."

Counsel could not agree on the wording of the jury instruction. Appellants proposed the following instruction, based on Judicial Council of California Civil Jury Instructions (CACI) No. 1103: "Plaintiffs must prove that City of Irvine had a notice of the dangerous condition before the incident occurred. To prove there was notice, plaintiffs must prove that the condition had existed for enough time before the incident and was so obvious that City of Irvine reasonably should have discovered the condition and known that it was dangerous. . . . [¶] . . . There are letters from citizens of Irvine which will be received in evidence in this case. You may consider these letters on the issue of notice, but for no other purpose."[3]

The court ultimately gave the following jury instruction just before a witness testified about the letters: "I am going to let these documents into evidence for a limited purpose only. Do you remember we talked about limited purposes yesterday? [¶] Okay. Now, 'limited purpose' means that you can consider them only for the limited purpose and not for anything else. Now, one of the issues in this case is notice. And so, these exhibits . . . they are going to be admitted for a limited purpose. They are not to be admitted for the truth of the matter described in the letters, but for the purpose of notice. So that means these letters may contain editorialization; comments that the intersection is dangerous, or comments about other things relating to children using it or other things that are of editorial nature. None of those things can be considered. The contents of the letters are not important. And you must be disciplined enough to disregard the contents of the letter. They are being admitted at this time for the limited purpose of notice to the city. In other words, people writing letters to the city with regard to notice. . . . [¶] . . .

[3] CACI No. 1103 was given as part of the final instructions as follows: "Plaintiffs must prove that City of Irvine had notice of the dangerous condition before the incident occurred. To prove that there was notice, Plaintiffs must prove: [¶] That the condition had existed for enough time before the incident and was so obvious that City of Irvine reasonably should have discovered the condition and known it was dangerous."

[¶] Once again, these things take a lot of discipline. So you're going to have to view the evidence only in the light as you are instructed." The court twice asked the jurors if there were any questions about limited admissibility, and there were none.

As the letters were individually introduced, during testimony, the court repeated its admonition about their limited purpose. A juror asked, "Can I ask a question? I understand the limited part. But what about the testimony? Because they're talking about it [i.e., the statements made in the letters]." The court responded, "The testimony comes in independently from the witness. We're talking about just the communication, just the letter, as notice. . . . But there are a lot of things in these letters that are comments, so I'm not letting it in for any of the comments. I'm only letting it in for notice to the City."

At the conclusion of the evidence, the jury also received the standard CACI instruction regarding evidence admitted for a limited purpose.

Appellants assert the trial court erroneously instructed the jury to "disregard anything written" in the notice letters, thereby rendering the letters "blank pages of copy paper." Appellants contend they were prejudiced because the letters were important evidence of notice and foreseeability.

Appellants' argument raises two initial questions. First, did the trial court err in refusing to give appellants' proposed instruction? Second, was the limiting instruction actually given a correct statement of the law as it applied to the case?

As to the refusal issue, it is not error to refuse to give an instruction substantially covered by other instructions. (See *Major v. Western Home Ins. Co.* (2009) 169 Cal.App.4th 1197, 1217.) In this case, the instruction appellants proposed was nearly identical to the version of CACI No. 1103 given just before deliberations. The only difference between the CACI instruction and the one appellants proposed was the wholly inadequate portion on limited purpose tacked on to the end, which was far too abstract and general to have properly directed the jury about these exhibits.

As to whether the limiting instruction was a correct statement of the law, appellants have misrepresented its import. The court carefully explained that the letters were not being admitted for the facts or opinions expressed in their content. They were to be considered only for notice to the City. The jury was to disregard anything else – "editorialization, comments that the intersection is dangerous, or comments about other things relating to children using it or other things that are of editorial nature. None of those things can be considered. The contents of the letters are not important." This instruction did not render the letters "blank pieces of paper," but rather concentrated the jury's attention on the critical point – notice – and deflected it from the inadmissible content –uncorroborated and out-of-court statements of fact and opinions.

The instruction correctly stated the law. Admitting the letters for the truth of the matter stated would violate the hearsay rule (Evid. Code, § 1200, subd. (a)) as well as in some cases the limits on lay opinion. (Evid. Code, § 800.) It was therefore crucially important that the jury ignore the editorializations and comments in the letters.[4] The statements in the letters regarding these subjects were inadmissible as evidence that they had actually happened or were true.

The record indicates the jury understood the instruction. When a witness started testifying about the content of the letters, a juror asked whether the jury could consider this testimony in light of the limiting instruction. This juror understood that the letters were to be considered for notice only and not for the truth of their contents. Live testimony, as the court informed the jury, was separate evidence.

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[4] Examples of the kinds of comments that could *not* be considered are: "For years residents have complained about this dangerous area and have requested that the speed limit be reduced and a signal or a four way stop be established at that corner to eliminate accidents. There are accidents at that corner on a monthly basis. This intersection is also an area where children cross for the local primary school." "Since my letter to you there have been no less than 3 more accidents at or near that location. [¶] It continues to boggle the mind, that when there is such a threat to life and limb, it takes weeks to merely install additional signage to notify drivers of a potential accident at a blind intersection," "multitude of accidents," "hazardous intersection." "Our most precious gifts, our children, use this intersection to attend primary school." "[S]ince my last letter I have witnessed an additional 6 accidents of varying degrees personally."

Appellants argue in their reply that they sought to introduce the letters for a nonhearsay purpose – "to evaluate whether [the City], in its position would have taken the information as true and whether [the City] would have investigated or acted upon such information." To support this argument, they cite *Holland v. Union Pacific Railroad Co.* (2007) 154 Cal.App.4th 940, 946 (*Holland*), on the nonhearsay use of an extradjudicial statement: "'to prove, as relevant to a disputed fact in an action, that the . . . hearer . . . obtained certain information by hearing . . . the statement and, *believing such information to be true, acted in conformity with such belief*.' [Citation.]" (Some italics added.) Appellants did not proffer this reason for admitting the letters' contents to the trial court.

Using the letters for notice purposes – as appellants claim was their goal – would not qualify as this kind of nonhearsay purpose. Notice means knowledge, actual or constructive. Either the City knew about the dangerous condition or it should have known about the condition because it was so obvious.[5] (§ 835.2.) But the kind of extrajudicial statement discussed in *Holland* goes well beyond this. The disputed fact this kind of statement seeks to prove is not just that the hearer heard it, but also that he believed it and acted accordingly. In other words, the statement explains why the hearer acted as he did, regardless of whether it was true. The jury in this case was not tasked with deciding whether the City believed the notice letters, regardless of their truth, and acted accordingly.

The trial court might well have excluded the letters altogether as evidence of notice, as the jurors were required to look at them with one eye shut. Unquestionably the content of the letters was objectionable, at the very least on hearsay grounds if offered as proof that the conditions on Trabuco Road met the statutory definition of a dangerous condition (§ 830, subd. (a)) or as evidence of a reasonably foreseeable risk. (§ 835.) The

[5] The jury received an instruction on constructive notice.

trial court gave appellants as much as it could considering Evidence Code section 352. Admitting them even with a limiting instruction risked confusing the jury.

As it turned out, the jury did not reach the notice issue because it decided that the dangerous condition on Trabuco Road did not create a reasonably foreseeable risk of Mirfakhraie's injury. That is, they found the dangerous condition did *not* create a reasonably foreseeable risk that a vehicle would collide with a pedestrian. So notice was not appellants' problem.

Appellants also assert that the limiting instruction prejudiced their ability to put on evidence of foreseeability. But using the notice letters for this purpose would run squarely into the problem the court hoped to avoid by means of the limiting instruction. It would be necessary to delve into the contents of each letter to see whether the writer was reporting an accident involving an injury like Mirfakhraie's. The letters themselves could not provide this kind of evidence without violating the hearsay rule. Had appellants called one or more of the letter writers as witnesses to testify about what they had actually seen, this problem could have been avoided.

We conclude that the limiting instruction correctly stated the law. There is therefore no need to examine it for prejudice.

B. Dangerous Condition Instructions

Appellants have identified three errors with respect to the jury instructions on dangerous condition of public property. First, they incorrectly stated the law. Second, two of them unduly emphasized the City's defenses. Finally, one of them was vague and misleading.

The trial court gave the jury three instructions regarding the "dangerous condition" element of public entity liability. One was a partial restatement of section 830.5, subdivision (a), which provides, "Except where the doctrine of res ipsa loquitur is applicable, the happening of an accident which results in injury is not in and of itself

evidence that the public property was in a dangerous condition." The jury instruction, special instruction No. 3, omitted the introductory clause regarding res ipsa loquitur.

The court also gave CACI No. 1102, "Definition of 'Dangerous Condition,'" which read when filled in for the purpose of trial, "A 'dangerous condition' is a condition of public property that creates a substantial risk of injury to members of the general public when the property is used with reasonable care and in a reasonably foreseeable manner. A condition that creates only a minor risk of injury is not a dangerous condition. [¶] Whether the property is in a dangerous condition is to be determined without regard to whether Decedent [Mirfakhraie], Jefferson Enriquez, or the S.U.V.[6] exercised or failed to exercise reasonable care in their use of the property." This instruction draws on section 830, subdivision (a).

The third instruction, special instruction No. 7, was the subject of a protracted debate, including the court's between-sessions review of the case law, and the result was a compromise. The final special instruction read, "For evidence of actual prior accidents to be used to prove the existence of a dangerous condition, the conditions under which the prior accidents occurred must be the same or substantially similar to the accident at issue. However, the absence of other similar accidents is relevant to, but not dispositive of, the issue of whether a condition is dangerous."

In fashioning special instruction No. 7, the court consulted *Salas v. Department of Transportation* (2011) 198 Cal.App.4th 1058, 1072 (*Salas*) ["It is well settled that before evidence of previous accidents may be admitted to prove the existence of a dangerous condition, it must first be shown that the conditions under which the alleged previous accidents occurred were the same or substantially similar to the one in question. . . . [¶] While there must be substantial similarity to offer other accident evidence for any purpose, a stricter degree of substantial similarity is required when other

[6] Another car was driving next to Enriquez and narrowly avoided hitting Mirfakhraie.

accident evidence is offered to show a dangerous condition"] and *Mixon v. Pacific Gas & Electric Co.* (2012) 207 Cal.App.4th 124, 138 [quoting *Salas*]. The court also reviewed *Lane v. City of Sacramento* (2010) 183 Cal.App.4th 1337 (*Lane*), as appellants' counsel urged. The court modified the City's original proposed instruction by adding the last sentence, from *Lane*.

1. Special Instruction No. 3

Appellants argue that special instruction No. 3 was improper because it duplicates CACI No. 1102, which draws on section 830, subdivision (a), thereby prejudicially emphasizing the City's defense.[7] Appellants support this argument with a passage from *Brown v. Poway Unified School Dist.* (1993) 4 Cal.4th 820 (*Brown*): "Thus, the Senate amendment dealing with res ipsa loquitur was expressly intended to abrogate a rule to the effect that 'the happening of the accident is evidence that public property was in a dangerous condition.' [Citation.] The rule had occasionally led to the imposition of liability on public entities for relatively trivial defects in, and unforeseeable uses of, public property. [Citations.] The [California Law Revision] Commission had already proposed to eliminate liability for trivial defects and unforeseeable uses by excluding them from the definition of 'dangerous condition.' This proposal, which the Legislature also adopted, eventually became section 830, subdivision (a). The Senate amendment concerning res ipsa loquitur (§ 830.5) merely reinforced the point." (*Id.* at p. 831.)

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[7] As given at trial, CACI No. 1102 read, "A 'dangerous condition' is a condition of public property that creates a substantial risk of injury to members of the general public when the property is used with reasonable care and in a reasonably foreseeable manner. A condition that creates only a minor risk of injury is not a dangerous condition. [¶] Whether the property is in a dangerous condition is to be determined without regard to whether Decedent, Jefferson Enriquez, or the SUV exercised or failed to exercise reasonable care in their use of the property."

Section 830, subdivision (a), provides, "'Dangerous condition' means a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used."

Appellants contend that *Brown* holds that sections 830, subdivision (a), duplicates section 830.5, subdivision (a). Therefore giving an instruction based on each code section was prejudicial error, because it unduly emphasized the City's position.

Appellants have misread *Brown*. The "point" that section 830.5, subdivision (a), "reinforced," according to this passage, was that a public entity could not be held liable for "relatively trivial defects in, and unforeseen use of, public property," as had sometimes been the case before the statute was enacted. (*Brown, supra*, 4 Cal.4th at pp. 830-831.)[8] The *Brown* court did not hold that the two statutes were duplicates. The opinion was concerned with another issue: whether and how much of a plaintiff's case for public entity liability could be supplied through res ipsa loquitur. (See *id.* at pp. 832, 836-837.) *Brown* does not apply here. Appellants did not resort to res ipsa loquitur to establish liability, and they did not confront a contention that the Trabuco Road intersection presented only relative trivial defects or an unforeseen use.

The two jury instructions did not duplicate each other. CACI No. 1102 gave the jury a comprehensive definition of "dangerous condition," including all of the elements necessary to establish it, and special instruction No. 3 prohibited the jury from taking the occurrence the accident itself as evidence of a dangerous condition.

Moreover, appellants have failed to explain how these instructions prejudiced them. The jury *agreed* with appellants that the Trabuco Road intersection was dangerous, despite being informed that the happening of the accident itself was not evidence of danger. The jury also agreed, pursuant to CACI No. 1102 (based on section 830, subdivision (a)), that the intersection met the criteria for a dangerous condition. Even if the two instructions were somehow duplicative, appellants were victorious on this point.

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[8] According to the legislative history, section 830.5 was added to the Tort Claims Act to "overrule[] cases that indicate that the happening of the accident is evidence that public property was in a dangerous condition." (*Brown, supra*, 4 Cal.4th at p. 830.)

2. Special Instruction No. 7

Special instruction No. 7 informed the jury that prior accidents could be evidence of a dangerous condition only if the conditions were "the same or substantially similar to the accident at issue." Absence of substantially similar accidents was "relevant to, but not dispositive of, the issue of whether a condition is dangerous."

Appellants do not argue that special instruction No. 7 incorrectly stated the law regarding the necessity of similarity between prior accidents and the one at issue in this case. Instead, they first complain that the word "dispositive" was legalese, too difficult for jurors to understand. Appellants failed to make this objection in the trial court, and it is too late to make it now. (See *Metcalf v. County of San Joaquin* (2008) 42 Cal.4th 1121, 1131 ["'Where . . . '"the court gives an instruction correct in law, but the party complains that it is too general, lacks clarity, or is incomplete, he must request *the additional or qualifying instruction in order to have the error reviewed.*" [Citations.]'"].)

The next complaint is that jury instructions are not supposed to quote from cases because they can contain improper statements of law. Once again, this is a criticism of the wording of the instruction, not of the statement of the law itself. Appellants do not explain how using language from *Salas, supra,* 198 Cal.App.4th 1058, made the statement of the law inaccurate. Appellants did not object to using the wording at the time the court fashioned special instruction No. 7. We also note that the court incorporated a quotation from *Lane, supra*, 183 Cal.App.4th at p. 1346, at appellants' urging, in the final version, again without protest from appellants. They have waived this objection as well, but given the propriety of the language challenged, the objection would fail anyway.

Finally, appellants assert that special instruction No. 7 was "an erroneous statement of law." It was not erroneous because it incorrectly stated the law, however, but rather because the court had already ruled as a matter of law on the relevant issue.

By admitting evidence of prior vehicle accidents, according to appellants' theory, the court ruled that something was a matter of law. It is not clear from their brief, however, what this matter of law entailed. As best we can make out, the matter of law was that the prior accidents were conclusive proof of foreseeability. Appellants seem to be objecting that special instruction No. 7 put the issue of foreseeability in the jury's lap, thereby "transfer[ing] the province of the judge to the jury." Appellants seem also to argue that by giving this instruction, the trial court "unadmitted" all the evidence of prior vehicle accidents or at least allowed the jury to speculate about whether the evidence was admissible.

Appellants base this argument on *Salas, supra,* 198 Cal.App.4th 1058, which was a summary judgment case on a vehicle/pedestrian accident. (*Id.* at pp. 1061-1062.) The trial court in *Salas* excluded traffic collision reports as irrelevant because the accidents in the reports were not substantially similar to the accident at issue. The reviewing court held that the trial court did not abuse its discretion in so doing, because "before evidence of previous accidents may be admitted to prove the existence of a dangerous condition, it must be first shown that the conditions under which the alleged previous accidents occurred were the same or substantially similar to the one in question." (*Id.* at p. 1072.) Appellants conclude that because evidence of prior accidents was admitted in this case – not excluded, as in *Salas* – the existence of a dangerous condition or foreseeability was no longer a question for the jury.

This argument is not easy to understand. In the first place, foreseeability *is* a question of fact for the jury. (See *Garcia v. Superior Court* (1990) 50 Cal.3d 728, 759 and cases cited [unless no room for reasonable difference of opinion, foreseeability of harm is question of fact]; *Weirum v. RKO General, Inc.* (1975) 15 Cal.3d 40, 46.] The record nowhere suggests that the court ever took this issue away from the jury. Second, the record is equally devoid of any suggestion the jury was instructed or invited to consider the evidence of prior accidents inadmissible or irrelevant. In fact, it seems quite

likely that the evidence of prior accidents impressed the jurors; that is probably why they found the Trabuco Road intersection dangerous – but dangerous to cars, not pedestrians.

Appellants' clinching argument on legal error unveils their true complaint: "[T]he confusion caused by the giving of [special instruction No. 7] can be seen by the jury's failure to find foreseeability of a risk of harm." The argument appellants make here, and throughout the opening brief, while couched in terms of jury instructions and inadmissible expert evidence, is actually a sufficiency-of-the-evidence argument.[9] They continue, "The idea that the risk of harm to pedestrians is not reasonably foreseeable when [the City] already asked for federal funding 9 months before the accident to protect against harm to pedestrians is untenable." This may well be evidence of a foreseeable risk, but there was countervailing evidence that the jury found more persuasive. The instruction was not responsible for the outcome; the jury's evaluation of the facts was. That is what juries are for.

With respect to special instruction No. 7, appellants waived the first two objections they make on appeal by not speaking up in the trial court. As to the last issue, appellants do not maintain that the instruction incorrectly stated the law regarding similarity of accidents. We therefore need not address prejudice.

II. Expert Opinion Testimony

Appellants assert that certain testimony by the City's experts was erroneously admitted and prejudicial to their case. We review the trial court's decision to admit expert testimony for abuse of discretion. (*People v. Prince* (2007) 40 Cal.4th 1179, 1222.) "An abuse of discretion occurs when, in light of applicable law and considering

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[9] In their reply brief, appellants present a multi-page argument on why the facts of *Salas* were different from the facts of their case. Even if this is so, it does not make *Salas* an incorrect statement of the law. Appellants had ample opportunity to argue their take on the facts to the jury.

We also do not consider arguments or theories presented to us for the first time in a reply brief. (*Varjabedian v. Madera* (1977) 20 Cal.3d 285, 295, fn. 11.) Appellants' sole argument of error regarding special instruction No. 7 concentrated on the transfer of "the province of the judge to the jury," not on the dissimilarity between the facts of *Salas* and the facts of the present case.

all relevant circumstances, the court's ruling exceeds the bounds of reason." (*North American Capacity Ins. Co. v. Claremont Liability Ins. Co.* (2009) 177 Cal.App.4th 272, 285 (*North American*).)

Evidence Code section 353 provides, "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: [¶] (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion; and [¶] (b) The court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice."

The expert testimony issue arose first in the trial court in connection with a motion in limine. Appellants moved to exclude any testimony by experts on the ultimate issue of reasonableness. The court explained that there were two schools of thought on this subject. Some courts excluded expert testimony on ultimate issues, while others permitted it. The trial court made it clear that it was in this latter category.

When appellants' counsel protested that he had not permitted his experts to go into the ultimate issue of reasonableness, the court asked, "Why would you ever limit yourself from hiring an expert for that? Why would you harness your expert? At least in the pretrial phase, why would you take him out of the ballpark in coming up with an opinion as to whether or not when your client [i.e., Mirfakhraie, the decedent] stepped off the curb, he did so under circumstances that were safe under the conditions [¶] . . . You voluntarily removed him [the expert] from that . . . ." When appellants' counsel responded that his experts had too much integrity to render opinions on ultimate issues, the court replied, "It would just be getting their opinion as to whether or not when your client stepped off the curb, it was safe to do so in crossing the street. That's what we're talking about. . . . [¶] . . . And that's the opinion that would be – and I'm going to allow

[the City's expert] to give such an opinion. And if your expert so opined, I'm going to allow your expert to say that." The court also pointed out that appellants had two weeks to make adjustments to their experts' testimony.[10]

Appellants' argument on this issue is based on the testimony of two of the City's expert witnesses: the accident reconstruction expert and the traffic engineer expert.

Testimony of Accident Reconstruction Expert

Appellants have singled out the following three series of questions and answers from the testimony of the City's accident reconstruction expert as erroneously admitted and prejudicial:

(1) "Q. In your opinion, based upon the work that you've done, do you believe that a pedestrian using reasonable care would've been able to determine if it was safe to enter the roadway 5.7 seconds before this accident?"

[objection overruled]

"The Witness: Yes.

"Q. And what, in your opinion, should a pedestrian using reasonable care have decided to do 5.7 seconds before the collision?

"A. Delay entry into the roadway. Because this is the only conflict to monitor, and you have two vehicles – not just one, but two vehicles – approaching. This is your only conflict to monitor. Delay entry until it's safe to do so.

"Q. Would it have been reasonable, in your opinion, for the pedestrian to have waited 10 seconds to allow the vehicles to pass?

"A. Yes."

(2) "Q. Now, in your opinion, assuming, hypothetically, a pedestrian looks to the right at this point in time, would the presence of the S.U.V. be viewed as a danger to the pedestrian?"

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[10] Actually, appellants had well over a month. Motions in limine were heard on September 27, 2016, and jury selection began on October 25. Appellants' first expert testified on November 14.

[objections; question restated]

"Q. Would it be a potential threat of collision?"

[objections overruled]

"The Witness: Yes. The conflicts are to the right. That's the only conflict to monitor, for the given conditions."

(3) "Q. . . . In your opinion, do you believe that [Enriquez] was acting in an attentive manner?

"A. I'd say reasonably so. All things considered. Because of the presence of the Golus vehicle, and the S.U.V., there's more than one conflict for him to monitor; whereas the pedestrian has only the eastbound traffic to monitor."

Testimony of Traffic Engineer Expert

Appellants have identified the following two series of questions and answers from the testimony from the City's traffic engineer expert as erroneously admitted and prejudicial:

(1) "Q. Why is it important to review what the witnesses actual see/say in doing an evaluation of a traffic engineering evaluation of a condition?

"A. There are two aspects of the law in the California Vehicle Code that specify rights-of-way at crosswalks. One of them says that vehicles need to give . . . ."

[objection overruled]

"The Witness: Two clauses of the Vehicle Code. I summarized the first one that says pedestrians have rights-of-way at crosswalks. The second one says the pedestrian cannot place themselves in undue jeopardy by stepping off the curb into the path of an approaching vehicle."[11]

[11] Vehicle Code section 21950 provides in part, "(a) The driver of a vehicle shall yield the right–of–way to a pedestrian crossing the roadway within any marked crosswalk or within any unmarked crosswalk at an intersection, except as otherwise provided in this chapter. [¶] (b) This section does not relieve a pedestrian from the duty of using due care for his or her safety. No pedestrian may suddenly leave a curb or other place of safety and walk or run into the path of a vehicle that is so close as to constitute an immediate hazard. No pedestrian may unnecessarily stop or delay traffic while in a marked or unmarked crosswalk."

(2) "Q. . . . Did you reach an opinion as to whether the decedent in this case used due care in crossing the crosswalk?"

[objection and reported chambers conference; testimony resumed]

"Q. Mr. Miller, as a traffic engineer, when you looked at this intersection, did you see, after you completed your analysis, anything that you believe was dangerous about it?

"A. No, I did not.

"Q. Please explain.

"A. Generally speaking, most collisions happen when one or both drivers or both parties break a law. I don't see anything in this location that would suggest that it would be possible for neither to break a law and to get into a collision with each other.

"I also found it to be in compliance with or in excess of compliance with the design standards for roadways and placement usage standards for traffic control devices."

Appellants have four objections to the admission of the above testimony. First, the opinions were not proper expert opinions because they fell within the common knowledge of the jury. Second, the experts were allowed to testify regarding legal conclusions, application of the Vehicle Code and other laws, duty, and proximate cause. Third, the experts were allowed to testify regarding ultimate issues. Finally, an expert was allowed to repeat inadmissible hearsay.[12]

A. Common Knowledge of Jury

A jury need not be wholly ignorant of the subject matter to warrant an expert's opinion testimony. If the expert's opinion would "assist the trier of fact" (see Evid. Code, § 80, subd. (a)), it may be admitted. Such testimony will be excluded "only

[12] Appellants also complained that the experts were allowed to testify regarding questions of fact, but appellants provided no specific instances of experts doing so. Without a citation to the testimony allowing us to evaluate it and a record of an objection on that ground (see Evid. Code, § 353), we cannot review this issue.

when it would add nothing at all to the jury's common fund of information[.]" (*People v. McDonald* (1984) 37 Cal.3d 351, 367, overruled on other grounds in *People v. Mendoza* (2000) 23 Cal.4th 896.) We review the trial court's decision as to whether expert testimony was sufficiently beyond the common experience for abuse of discretion. (*People v. McDowell* (2012) 54 Cal.4th 395, 426.)

Appellants argue that the identified testimony regarding pedestrians was not expert testimony at all, because ordinary people know how to cross a street. Appellants also contend that expert testimony about Enriquez's attentiveness while driving should not have been allowed, because that too is a matter of "common knowledge and ordinary experience."

The only testimony on these topics identified by appellants was that of the accident reconstruction expert. The testimony regarding crossing the street, taken in context, went beyond common knowledge. The expert was reconstructing the accident for the jury, using slides that showed the positions of the cars and the pedestrian at various times. He gave extensive testimony regarding the relative speeds of Enriquez, Mirfakhraie, and the driver of the S.U.V., using 40 miles per hour and 50 miles per hour as the speed of the cars. At one point, he showed slides reconstructing the accident second by second. He also framed the decision to cross the street in terms of "monitoring conflicts," which would not be an ordinary way of thinking about this subject.

For the same reason, the expert's testimony about Enriquez's attentiveness was not common knowledge. Once again, this testimony was framed in terms of monitoring conflicts – this time from the driver's perspective – which is not the usual way of thinking about driving a car.

We cannot conclude that the trial court abused its discretion by permitting this testimony. Once again, appellants' complaint is properly directed to the jury, not the judge.

B. Legal Conclusions, Application of Vehicle Code and Other Laws, Duty, Proximate Cause

The only testimony identified by appellants in this category is the traffic engineer's reference to the Vehicle Code. This testimony was not a legal conclusion. The witness explained he did not regard the Trabuco Road intersection as dangerous because "most collisions happen when one or both drivers or both parties break a law." He saw nothing in the intersection to suggest that a collision could happen *without* somebody breaking a law. His reference to the Vehicle Code subdivisions merely enlightened the jury about the laws underlying his opinion. He did not opine that somebody broke a law. And, in any event, the jury disagreed with him on the dangerous condition issue, so there could have been no prejudice.

C. Ultimate Issue Testimony

The court clearly indicated before trial started that it would permit ultimate issue testimony by experts on both side, provided this testimony was encompassed by their depositions and reports. Evidence Code section 805 provides, "Testimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact." (See, e.g., *Hasson v. Ford Motor Co*. (1982) 32 Cal.3d 388, 403 [expert opinion on conscious disregard of safety] (*Hasson*); *North American, supra,* 177 Cal.App.4th at p. 294 [expert's opinion regarding relative percentages of responsibility of subcontractors for defects]; *State Compensation Ins. Fund v. Operated Equipment Co*. (1968) 265 Cal.App.2d 759, 765 [expert's opinion as to whether equipment release was safe practice]; *Magee v. Wyeth Laboratories, Inc*., (1963) 214 Cal.App.2d 340, 357 [expert opinion on safety of drug].) Appellants have not shown the trial court abused its discretion by permitting ultimate issue testimony in general or that they were prejudiced.

The specific testimony appellants have cited also does not support their contentions:

(1) The traffic engineer expert was asked whether the decedent used due care in crossing the sidewalk. As shown above, the expert never answered that question. After counsel and the court emerged from a chambers conference regarding ultimate issue testimony, the witness was asked a different question. He was asked whether he thought the Trabuco Road intersection was dangerous. He said no. The jury disagreed and found in appellants' favor on the dangerous condition issue. Even if the testimony was admitted erroneously, there was no prejudice.

(2) Appellants contend that the accident reconstruction expert's testimony about reasonable care by a pedestrian and Enriquez's attentiveness was ultimate issue testimony.

Reasonable care or "due care" had two aspects in this context. The definition of "dangerous condition" has a due-care element. (§ 830, subd. (a).) Public property is in a dangerous condition if it creates a substantial risk of injury even when used with due care. This is the care required of the so-called "reasonable person" (fka "reasonable man"). As the jury instruction explained, this kind of due care was to be determined without reference to the acts of specific people such as Mirfakhraie or Enriquez. The jury decided that the Trabuco Road intersection was in a dangerous condition; that is, it created a risk of injury even when used with due care.

But the special verdict also included an affirmative defense of contributory negligence, by Mirfakhraie and/or Enriquez. In deciding this issue, the jury had to focus on their conduct. "Contributory negligence arises from a lack of due care." (*Fuller v. State of California* (1975) 51 Cal.App.3d 926, 942.)

Although it is not entirely clear, appellants seem to be referring to the second kind of due care in their objections to the expert's testimony. They object to his opinion "that a pedestrian using reasonable care should not have decided to step off the curb into the crosswalk 5.7 seconds before the collision, but that it would be reasonable for a pedestrian to step off the curb 10 seconds before the collision." This testimony

clearly referred to the specific circumstances of Mirfakhraie's accident, as the expert had reconstructed it. They further object to the expert's opinions that "an attentive pedestrian would have viewed the oncoming vehicle [i.e., Enriquez's car or the S.U.V.] as 'a potential threat of a collision'" and that Enriquez was driving attentively. Again this testimony was specific to Mirfakhraie's and Enriquez's conduct.

We do not think the trial court abused its discretion in allowing this testimony. (See Evid. Code, § 805.) But even if it did, there could have been no prejudice. If the expert's testimony is referring to the due care of the reasonable person, that is, the due care referred to in the definition of "dangerous condition," then the jurors disagreed with the expert. They concluded the intersection was dangerous even if used with due care. If the testimony is referring specifically to Mirfakhraie's conduct, the jury did not reach the portion of the special verdict that dealt with contributory negligence – lack of due care – by either Mirfakhraie or Enriquez. It stopped well before reaching this issue. Either way, there was no prejudice.

D. Repeating Hearsay

Finally, appellants fault the trial court for allowing the City's expert to repeat inadmissible hearsay in front of the jury. Appellants have, however, directed us to only one instance where an expert, the traffic engineer, answered a question with hearsay, from Golus's deposition. Appellants' counsel immediately objected. The court sustained the objection and immediately instructed the jury to disregard the answer. Appellants neglected to point out in their opening brief that the court struck the testimony and instructed the jury to disregard it.

III. Juror Misconduct

Appellants moved for a new trial in part based on juror misconduct. (See Code Civ. Proc., § 657, subd. (2).) To support this motion, appellants submitted two declarations from jurors. The declarations referred to three general topics. First, jurors expressed opinions regarding Mirfakhraie's negligence and its effect on their decisions.

Second, two or three jurors made remarks indicating they had not been paying attention. Finally, a juror who was an engineer calculated that Enriquez could have stopped in time to avoid hitting Mirfakhraie if he had been driving at 35 miles per hour.

The trial court denied the motion for new trial, including the portion of the motion based on juror misconduct, finding that appellants had submitted no evidence of "objectively ascertainable overt acts which establish that any of the jurors based their verdict on speculated facts . . . a misunderstanding of the law, likely stopping distance or juror inattentiveness."

To determine whether a party has established juror misconduct, "[t]he trial court must first 'determine whether the affidavits supporting the motion are admissible. [Citations.]' This, like any issue of admissibility, we review for abuse of discretion. [Citation.] [¶] Second, 'If the evidence is admissible, the trial court must determine whether the facts establish misconduct. [Citation.]' [Citation.] . . . On review from a trial court's 'determin[ation of] whether misconduct occurred, "[w]e accept the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence. [Citations.]"' [Citations.] [¶] '"Lastly, assuming misconduct, the trial court must determine whether the misconduct was prejudicial." [Citation.]'" (*Barboni v. Tuomi* (2012) 210 Cal.App.4th 340, 345.) We review the issue of prejudice independently. (*People v. Nesler* (1997) 16 Cal.4th 561, 582.)

Evidence Code section 1150, subdivision (a), provides: "Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined." Interpreting this code section, our Supreme Court has ruled that "[t]he only improper influences that may be

proved under section 1150 to impeach a verdict, therefore, are those open to sight, hearing, and the other senses and thus subject to corroboration." (*People v. Hutchinson* (1969) 71 Cal.2d 342, 350.) The Evidence Code section creates a "distinction between proof of overt acts, objectively ascertainable, and proof of the subjective reasoning processes of the individual juror, which can be neither corroborated nor disproved" (*id.* at p. 349) and permits only evidence of the former to impeach a jury. (See *People v. Cox* (1991) 53 Cal.3d 618, 694-696, overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390 [court is "precluded from considering any matters concerning the jurors' ratiocinations"]; *Akers v. Kelley Co*. (1985) 173 Cal.App.3d 633, 656-657, overruled on other grounds in *People v. Nesler*, *supra*, 16 Cal.4th 561.)

A juror declaration that purports to establish "'deliberative error' in the jury's collective mental process," such as "confusion, misunderstanding and misinterpretation of the law," including regarding the way in which the jury interpreted and applied jury instructions, is inadmissible under Evidence Code section 1150. (*Mesecher v. County of San Diego* (1992) 9 Cal.App.4th 1677, 1683-1684, quoting *Ford v. Bennacka* (1990) 226 Cal.App.3d 330, 336.)

Nearly all of the declarants' statements regarding their fellow jurors are descriptions of the latter's subjective reasoning or of how they arrived at their decisions on the first two questions of the special verdict. Most of the comments related in the declarations have to do with the opinions jurors expressed regarding negligence, which purportedly led to their decision in favor of the City on the second question of the special verdict. Each of these comments is a "matter concerning a juror's ratiocination" (*People v. Cox*, *supra*, 53 Cal.3d at p. 695) and thus unavailable to impeach a verdict. The allegation that one juror did not remember one of the exhibits hardly amounts to juror misconduct or even surprises, in light of the nearly 100 exhibits admitted into evidence.

The declarants also alleged that two other jurors stated they "'tuned out'" or "'slept'" through the playing of deposition videos and that one juror, an engineer,

calculated whether Enriquez could have stopped in time if he had been traveling at 35 miles per hour. The "tuned out" statements are hearsay if offered to prove the jurors actually tuned out and are therefore inadmissible. (See *Burns v. 20th Century Ins. Co.* (1992) 9 Cal.App.4th 1666, 1670-1671 [Evidence Code section 1150 permits only admissible evidence to impeach verdict].) Moreover, the declarants presented no evidence that the engineer's calculations played any part in the final verdict or that tuning out during deposition videos had any effect at all on the verdict. (*See Hasson, supra,* 32 Cal.3d at pp. 411-412, 415 [even if failing to pay attention is misconduct, no prejudice shown].) We cannot fault the trial court's resolution of this issue.

IV. Design Immunity

In its brief, the City has asserted that it is entitled to judgment based on design immunity. The jury did not reach the portion of the special verdict relating to design immunity. There is, therefore, nothing for us to review. Making a ruling on this subject in our court would be the equivalent of granting a motion for summary judgment or directing a verdict in the City's favor. Neither is part of our job description.

DISPOSITION

The judgment is affirmed. Respondents are to recover their costs on appeal.

BEDSWORTH, ACTING P. J.

WE CONCUR:

MOORE, J.

IKOLA, J.